IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 223

JESSE JAMES GILBERT,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S BRIEF

LUKE MCKISSACK
1725 N. Ivar
Los Angeles, California 90028
Attorney for Petitioner

INDEX

TABLE OF AUTHORITIES

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Opinions Below

The opinion of the Supreme Court of the State of California was rendered December 15, 1965, and is reported at 63 Cal. 2d 690, 47 Cal. Rptr. 909 (1965).

Grounds Upon Which Jurisdiction Is Invoked

The judgment sought to be reviewed is dated December 15, 1965, and was rendered on that date. Petition for rehearing was denied on February 11, 1966.

The statutory provisions conferring on this Court jurisdiction to review by Writ of Certiorari the judgment in question is Title 28 United States Code section 1257 (3).

Questions Presented

1. Whether a criminal conviction can be sustained under the Fourteenth Amendment to the United States Constitution when the co-defendant's illegally obtained out-of-court statements depicting petitioner as a murderer, robber, and kidnapper, were presented to the jury?

2. Whether a criminal conviction can be sustained under the Sixth and Fourteenth Amendments to the Federal Constitution when petitioner was, subsequent to indictment and arraignment and the appointment of counsel, forced to participate in a police showup wherein the case against him was perfected?

3. Whether petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights when he was, without appropriate admonitions as to his constitutional rights to counsel and silence, requested and did furnish incriminating handwriting exemplars which cinched the case against him?

4. Whether a conviction based in large part upon the illegally seized evidence in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution can stand?

History of the Case

On March 10, 1964, a Los Angeles County Grand Jury returned a seven count indictment against petitioner (hereinafter "Gilbert") and co-defendant King, charging that on January 3, 1964, each of them violated Penal Code section

187 (Counts I and II), Penal Code section 211 (Count III), and Penal Code section 209 (Counts IV, V, VI and VII, C.T. 1-8).[1]

The case came on for jury trial June 8, 1964, in Department "A" (later changed to "C") of the Northeast District (Pasadena), of the Superior Court of California, in Los Angeles County, Honorable H. Burton Noble, Judge presiding (R.V.D. 1, 22, C.T. 19-20).

The trial of the guilt issue concluded on July 16th, and on July 17th, the jury returned a verdict of guilty against Gilbert and co-defendant King on all seven counts (C.T. 48, 144-146, 156, 164).

A bifurcated penalty trial was had before the same jury on July 21, 1964, and the cause was submitted to the jury on July 28th (C.T. 165-170). On July 29th, the jury returned its verdict recommending the death penalty for Gilbert on both Counts I and II, and life imprisonment for co-defendant King (C.T. 201-203).

The Supreme Court of the State of California affirmed Counts I, III, IV, V, VI and VII as to Gilbert, reversing Count II, the second murder conviction, while reversing co-defendant King's conviction in its entirety (see, A-21).

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[1] "C.T." is reference to the Clerk's Transcript, one volume. "R" is reference to the Reporter's Transcript, volumes thru

Grand Jury transcript, one volume.

"R.V.D." is reference to the Reporter's Voir Dire, volumes thru

Each of the above mentioned volumes is attached hereto as part of the records of this case.

Statement of Facts

On January 3, 1964, the Mutual Savings & Loan Association of Alhambra, California (hereinafter "the association") was robbed by two armed men about 10:45 a.m. (R. 315). In fleeing the premises, one of the robbers shot and killed Sergeant George Davis of the Alhambra Police Department (R. 531-539).

Meanwhile, Officer Nixon appeared. He fired one shot at the fleeing robbers, striking the larger of the men in the back (hereinafter "Weaver"). The wounded Weaver was captured a few blocks from the association by Nixon and taken to the Los Angeles County Hospital where he died later that night (R. 1086). Before he died, Weaver was interrogated by F.B.I. agent Norton. Weaver admitted being a participant in the association robbery and said that a person known to him as "Skinny" Gilbert was his accomplice. This was not a dying declaration (R. 1226-1227).

Weaver told agent Norton that Gilbert lived in Apartment 28 of a Hawaiian sounding named apartment house on Los Feliz Boulevard (R. 1221). Norton in turn gave the information to F.B.I. headquarters.

In the field, agent Keil was dispatched by radio to locate the apartment house. He located a similar building about 1:00 p.m., the "Lanai" (R. 1173-1174) and informed radio control (R. 1189-1190); Keil then entered the courtyard of the Lanai where he engaged the Manager, Mrs. Smith, in conversation. While Keil was speaking to Mrs. Smith, a tenant came over and gave her a key, saying that he was going to San Francisco to be back Tuesday (R. 1135-1137). When Keil learned from the manager that the resident of Apartment 28 was the person who had just turned

in his key and left by the rear exit, he ran out into the alleyway but saw no one (R. 1150).

About 1:30 p.m., agents Schlatter and Onsgaard appeared. Keil told them the resident of Apartment 28 was a Robert Flood who had just left (R. 1178).

The officers were without a search or arrest warrant (R. 1261-1262), and they did not have a photograph of the person accused by Weaver (R. 1265). Agent Schlatter's sole conversation with the manager was to obtain a key to Apartment 28 (R. 1278).

Agent Schlatter said the entry was in the nature of a raid and there was no reason to announce his purpose or authority (R. 1250).

The apartment was unoccupied (R. 1271). Once inside, the agents conducted a search (R. 1301 et seq.).[1] In the course of search, agent Crowley noticed an envelope on a dresser. Opening the envelope, he found four photographs of Gilbert (R. 1301-1303).

The photographs were removed without a warrant (R. 1192-1195, 1303). They were taken to the association by agent Keil where they were blown up by polaroid process and shown to eyewitnesses to the robbery (R. 1287 et seq.). They were introduced into evidence at trial (R. 1437, 2333, Exhibits 46 and 46-A); the photographs were also used before the grand jury (R. 2328).

At trial and upon appellate review, Gilbert made objection to the introduction of the photographs and the fruits

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[1] See, Appendix "B" for a list of evidence turned up in the January 3 search that was subsequently seized pursuant to warrants that issued January 3 and 5, 1964.

thereof, and other items of physical evidence upon the ground that it was unlawfully seized, or was the fruit of an unlawful search and seizure (R. 1147 et seq.), followed by motions to suppress said evidence upon constitutional grounds (R. 1385-1386) with said motions denied by the courts below (R. 1408; A-13).

Gilbert was arrested by the F.B.I. at Philadelphia, Pennsylvania on February 26, 1964 (R. 1548-1549). The indictment in the case at bar was returned on March 10, 1964 (C.T. 1-8). On March 26, after counsel had been appointed and after he had pleaded not guilty to the charges, Gilbert was taken to a police line-up where witnesses to the association robbery were called upon to identify him (e.g., R. 2197-2198).

Defense motions to strike and suppress the identification testimony of such witnesses were denied (R. 189; 196).

The courts below allowed in evidence, over defense objections, handwriting exemplars taken from Gilbert after his arrest by the F.B.I. (R. 1852). The courts below concede that Gilbert had demanded the presence of counsel prior to making the handwriting exemplars (R. 1846; A-15) but refuse to suppress on the ground that Gilbert waived the right to counsel (R. 1852; A-16).

Summary of Argument

1. Petitioner was denied due process of law when the declarant-co-defendant's illegally obtained confession was presented to the jury. That statement depicted Gilbert as a murderer, robber and kidnapper. *Jackson* v. *Denno*, 378 U. S. 368 (1964).

2. Petitioner was denied his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution when he was, subsequent to indictment and arraignment and the appointment of counsel, forced to participate in a police showup wherein the case against him was perfected. *Massiah* v. *United States*, 377 U. S. 201 (1964).

3. Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights when he was, without appropriate admonitions as to his Constitutional rights to counsel and silence, requested to and did furnish incriminating handwriting exemplars which cinched the case against him. *Escobedo* v. *Illinois*, 378 U. S. 478 (1964).

4. Petitioner was convicted based upon evidence directly attributable to an illegal search and seizure of his apartment under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution. *Stoner* v. *California*, 376 U. S. 483 (1964).

I.

Petitioner was deprived of the due process of law under the Fifth and Fourteenth Amendments of the United States Constitution when the trial court permitted the jury to hear the out-of-court declarations of co-defendant King which extensively recited petitioner's participation in murder, robbery and kidnaping.

During the trial the prosecution called Officer Bennett to the stand. He recited co-defendant King's extrajudicial confession before the jury (R. 1951 et seq.). The officer made reference to Gilbert 159 times (R. 1951, 1962, 1969, 1971, 1974, 1995, 2001, 2006, 2008, 2014-2015, 201 , 2031-2034, Vol. 14). Officer Bennett testified:

> "Gilbert further told King that as the officer had gone out the door, being backed up, that Gilbert had just gotten out of the door also when he fired one shot, hitting the officer in the head, and the officer fell to the pavement. . . ." (R. 1954).

Gilbert rested his case upon the People's evidence. The California Supreme Court held that the out-of-court statements of co-defendant King (which implicated Gilbert) should not have been admitted even as to King because they violated the *Massiah-Escobedo rule,* 63 Cal. 2d 690, (1965) but finding insufficient prejudice, it affirmed the decision.

There is no question but that King's statements were obtained in violation of the rules formulated by this Court in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). The statements were made while he was in custody and the investigation had focused upon him concerning the known crimes

of robbery and murder. 63 Cal. 2d at 699. Moreover, no statement of his Constitutional rights was furnished. And appropriate admonitions cannot be presumed from a silent (63 Cal. 2d at 699) record. *California* v. *Stewart*, 86 S. Ct. 1602, 1640 (1966).

The Supreme Court of California ruled as a matter of state law that the vague testimony which King gave at trial was induced by his improperly introduced extrajudicial confession. It stated:

> "There is also no merit in the contention that the erroneous admission of King's statements was not prejudicial to him because he took the stand and testified to committing the same acts that he had admitted in his statements. When King testified, the only evidence other than his statements that had been introduced to connect him with the crime was a fingerprint identified as his on a shopping bag similar to the one that had been used in the robbery. Since the details of his volunteered statements during booking are not in evidence, it is impossible to determine whether detailed evidence of those statements alone would have impelled his testimony. The detailed inadmissible statements including admissions of guilty knowledge, clearly left King no choice but to take the stand and attempt to exculpate himself by testifying that he did not know that Gilbert and Weaver intended to commit a robbery. Thus, King's testimony cannot be segregated from his erroneously admitted statements to sustain the judgment . . ." at page 701.

Certainly, King was not required to invoke a childish ostrichlike refusal to face facts and with unreasoning per-

tinacity bury his head in the sand in protest and suffer inevitable conviction, but was permitted to employ all available legal tactical means to assuage the injuries inflicted, including taking the stand. Cf. *United States* v. *Ballard*, 322 U. S. 78, 84-5 (1944).

Furthermore, the Court admitted that King's testimony was less damaging than his extrajudicial statements. 63 Cal. 2d at 702.

At any rate, California's highest court has held that the in-court statements were induced by the illegally obtained out-of-court statements and the ruling does not present a federal question.

It has long been the law that if evidence is illegally acquired from one party and is introduced in a jury trial where it implicates another co-defendant as well, reversal is imperative. *McDonald* v. *United States*, 335 U. S. 451 (1948); *Nelson* v. *United States*, 208 F. 2d 505 (1953).

When one co-defendant implicates the other in a full scale confession of his associate's misdeeds and the jury is allowed to hear the police officer's narration of the confession, the gravest kind of error is committed and the conviction is invalidated. *People* v. *Aranda*, 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P. 2d 265 (1965); *Anderson* v. *United States*, 318 U. S. 350, 356-57 (1943).

In this case, the jury was instructed to limit King's out-of-court confession to King alone and not consider it as to Gilbert. Needless to say this was like asking a jury to unring a bell. In *Jackson* v. *Denno*, 378 U. S. 368 (1964), this Court reversed a conviction because the defendant was constitutionally entitled to have the trial judge or another judge or another jury rule on the question of the voluntari-

ness of a confession before it was put to the jury. The Court concluded that the jury although it was expressly told that the confession should be ignored unless found to be voluntary most probably could not separate the question of voluntariness from its truth.

> "If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?" At pp. 388-89.

The court also relied upon Mr. Justice Frankfurter's forceful dissent in *Delli Paoli* v. *United States*, 352 U. S. 232 (1957):

> "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." At p. 248.

Although it has been suggested that reversals in this kind of situation are predicated upon the assumption that the jury cannot effectively disregard the evidence which they have heard, although told to do so, and that such an approach belittles the jury system, we think the appropriate answer was provided by Mr. Justice Frankfurter in a coerced confession case, *Watts* v. *Indiana*, 338 U. S. 49, 52, wherein he stated:

> "(T)here comes a point where this court should not be ignorant as judges of what we know as men." Cf. *Sheppard* v. *Maxwell*, 86 S. Ct. 1567 (1966).

As Mr. Justice Jackson stated in his concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), a case where extrajudicial statements were introduced against a co-conspirator who didn't make them:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . . all practicing lawyers know to be unmitigated fiction." At p. 453.

The court in *Jackson* v. *Denno, supra,* also feared the specter of the "compromise verdict."

In *People* v. *Aranda*, 63 Cal. 2d 518 (1965), the California Supreme Court was confronted with a situation exactly like Gilbert wherein a confession of one co-defendant had been extracted in violation of the *Escobedo* decision and introduced in a jury trial with the limiting instruction that it be used only against the declarant. The Court concluded that irrevocable prejudice to the co-defendant had been committed. In interpreting *Jackson* v. *Denno, supra,* the Court remarked:

> "Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a co-defendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

"Indeed the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any co-defendants of the declarant. A jury cannot segregate evidence into separate intellectual boxes. It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." At pp. 528-29.

The *Aranda* court concluded that "At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant." At page 526.

Due to the grave doubts the Court entertained that joint trials could now be permitted when the confession of one co-defendant implicates another, the Court adopted a three prong test which must be followed in these situations:

"(1) It can permit a joint trial if all parts of the extrajudicial statements implicating any co-defendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of co-defendants but any statements that could be employed against non-declarant co-defendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a co-defendant, the trial court must exclude it if effective deletions are not possible. At page 531. Cf. *Delli Paoli* v. *United States*, 229 F. 2d 319, 322 (1956) (dissenting opinion of Frank, J.).

Petitioner urges that the use of illegally obtained evidence against him violated due process of law. Secondly, that irrespective of whether the statements were illegally obtained, the jury could not ignore the devastating impact of his co-defendant's out-of-court confession implicating him. Hence his due process rights were likewise violated.

Finally, he asserts that if the illegally obtained statements would invalidate any evidence recovered as a result of said statements under the "poisoned fruit" doctrine, *Wong Sun* v. *United States*, 371 U. S. 471 (1963), it stands to reason that his conviction is equally poisoned fruit.

II.

Petitioner after being indicted by a California grand jury for murder, robbery and kidnaping was appointed a lawyer by the court and entered pleas of not guilty to all charges. Thereafter, he was compelled to then participate in a "showup" at which the prosecution cemented its case against him. The "showup" was conducted without prior notice to either petitioner or his attorney of record and his attorney was not afforded an opportunity to be present nor make objections to the proceeding. This activity was in clear contravention of the Sixth and Fourteenth Amendments to the United States Constitution.

After the indictment had been returned charging petitioner with the crimes of murder, robbery and kidnaping arising from an officer-killing during an escape from the scene of an Alhambra Savings and Loan Association robbery, Gilbert was arraigned and pled not guilty to all charges. Counsel was appointed for him prior to arraignment and plea. Since first degree murder was not a bailable offense he remained within the confines of the Los Angeles County jail. On March 26, 1963, eight days after his arraignment and the appointment of counsel, Gilbert was suddenly and without notice to himself or his counsel compelled to take part in a police directed "showup." This "showup" is only sketchily described in the record, but it is clear that the identification case against Gilbert was made at the lineup. The police officials sought no court order for Gilbert's participation which was an indisputed requirement under California Penal Code section 4004.

During the trial of the guilt issue, four identification witnesses, including Gilbert's landlady, Mrs. Bette Wilner, testified that they had appeared at such "showup." Defense motions to strike and suppress the identification testimony

of all four witnesses were denied (R. 189-196). Cf. *Stoner* v. *California,* 376 U. S. 483 (1964); *People* v. *Stoner,* 241 ACA 814, 50 Cal. Rptr. 712 (1966). During the penalty phase of the proceedings, evidence was offered to the effect that Gilbert had committed five other robberies prior to the commission of the Alhambra robbery. Eight witnesses from the several banks involved identified Gilbert as one of the bank robbers. All eight attended the aforementioned police showup (R. 3376, 3378, 3410, 3449, 3450, 3472, 3509, 3510, 3549, 3550, 3744, 3745, 3757). Defense motions to suppress respective identification testimonies were denied (R. 3697, 3698).

A. Petitioner's Sixth Amendment Rights, Whether Viewed as Directly Applicable to the States or Incorporated in the Fourteenth Amendment Due Process Clause and Thereby Transmitted to the States, Were Violated.

Ever since *Powell* v. *Alabama,* 287 U. S. 45 (1932), it has been recognized with little dispute that the right to counsel from the onset of criminal *judicial* proceedings to their termination was an absolute requirement for a fair trial. In fact, this Court has held that a violation of this sacred guarantee renders void the remainder of proceedings. In *Johnson* v. *Zerbst,* 304 U. S. 458, 467 (1938), a classic Sixth Amendment case, this Court declared:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."

That the presence of counsel from arraignment to judgment is a jurisdictional *sine qua non* to a valid conviction

in a state court as well follows ineluctably from a host of recently decided cases. *Gideon* v. *Wainwright,* 372 U. S. 335, 336-37, 342-5 (1963); *Douglas* v. *California,* 372 U. S. 353, 354-58 (1963); *White* v. *Maryland,* 373 U. S. 59, 59-60 (1963); *Hamilton* v. *Alabama,* 368 U. S. 52, 54-55 (1961).

Hamilton v. *Alabama, supra,* invalidated a death penalty murder conviction because the defendant was without counsel at the arraignment. In counsel's absence the defendant merely pleaded not guilty. The Court noting the critical need for counsel at *all* stages of the proceedings, including arraignment, reversed the conviction.

As far back as *Powell* v. *Alabama, supra,* when the right to counsel rule was in its embryonic stage of development, this Court noted:

> "... during perhaps the most critical period of the proceeding ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation (are) vitally important, the defendants ... (are) as much entitled to said aid (of counsel) during that period as at the trial itself." 287 U. S. at 57.

In *White* v. *Alabama,* 363 U. S. 59, 59-60, (1963), this Court held that a plea of guilty obtained at the preliminary hearing in the absence of counsel could not be utilized against the defendant in a later trial after the plea had been withdrawn. The Court reversed stating:

> "Although petitioner did not object to the introduction of this evidence at the trial ... the rationale of *Hamilton* v. *Alabama, supra,* does not rest, as we shall see, on a showing of prejudice." 363 U. S. at 61.

Cf. *Pointer* v. *Texas,* 380 U. S. 400 (1965).

The obvious reason for insistance on strict compliance with Constitutional requirements in Right to Counsel cases is the simplicity of the task, the recognition that "the degree of prejudice can never be known," *Hamilton* v. *State of Alabama, supra,* at 159, and the cumbersome prospect which *ad hoc* determinations invariably portend. While the question of when the right to counsel attaches is fraught with considerable difficulty in a pre-trial context, the inauguration of judicial proceedings marks a clear cut departure from the investigatorial to the accusatorial phase of a lawsuit. Once having crossed the Jordan, counsel must walk hand in hand with the defendant the rest of the way.

In *Spano* v. *New York,* 360 U. S. 315 (1959), this Court reversed a state criminal conviction for murder because a confession had been extracted from the accused in violation of the due process clause. However, four members of the Court, while concurring in the conclusion that the confession was coerced, "pointed out that the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. It was pointed out that under our system of justice, the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.'" *Massiah* v. *United States,* 377 U. S. at 204.

A fair trial demands that once judicial proceedings have commenced, they may not be summarily adjourned and the accused conscripted at the sole behest of the police, and without notice to the Court or counsel, to play his role in the manufacturing of evidence against himself.

Mr. Justice Douglas in his concurring opinion in *Spano, supra,* had this to add:

> "We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice . . . But here we deal not with a suspect but with a man who has been formally charged with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied. This is a capital case; and under the rule of *Powell* v. *State of Alabama* . . . the defendant was entitled to be represented by counsel. This representation by counsel is not restricted to the trial.
>
> ". . . Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself . . .
>
> ". . . This is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel." 360 U. S. at 325.

In *Massiah* v. *United States,* 377 U. S. 204 (1964), the Court clearly and unequivocally obliterated any distinction between judicial and extra-judicial action by the police once the "criminal prosecution has begun." *Stovall* v. *Denno,* 355 F. 2d 731 (1966) (dissenting opinion of Justice

Friendly); in accord, see *Wade* v. *United States*, 358 F. 2d 557 (1966).

Justice Stewart speaking for the majority in *Massiah* declared:

> "it was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extra judicial proceeding. Anything less, it was said, might deny a defendant's effective representation by counsel at the only stage when legal aid and advice would help him." 377 U. S. at 204.

In *Massiah*, as here, we ask nothing more than that after the judicial proceedings have commenced and counsel is either retained or appointed, it makes no difference, *Miranda* v. *Arizona*, 80 S. Ct. 1602, 1612, 1630 (1966), the Government should be forbidden to utilize the defendant to gather evidence against himself in the absence of counsel.

In two recent decisions the Federal Circuit Courts have proffered conflicting views of the right to counsel requirement at a post-arraignment "lineup" or "showup."

In *Stovall* v. *Denno*, 355 F. 2d 731 (1966), the majority of the Judges for the Second Circuit Court of Appeals held that counsel was not required in a context wherein a defendant, after arraignment in a New York State court for murder, was granted a six day continuance to obtain an attorney of his choosing and before he did so was escorted to the hospital room of the victim's wife and identified. The Court first held that identification evidence did not violate the privilege against self-incrimination and

that only testimonial evidence rather than "an exclusion of his body as evidence" is encompassed by that right. The Court next held that due process of law was not violated which is not important at this juncture. Finally, the Court held that inasmuch as the defendant made no incriminating statements, there was no deprivation of his right to counsel. "Counsel could not have altered the course of events as to identification" and the defendant gave no other evidence which could have been precluded by timely advice from counsel. Cf. *Schmerber* v. *California,* 86 S. Ct. 1826, 1833 (1966).

The *dissent* pointed up by illustration the basic fallacy underlying the majority opinion which coincidentally is the crux of the entire case of *Gilbert* v. *California.*

> "The panel recognized that 'the privilege (of the Fifth Amendment against self-incrimination) does not invest a defendant with immunity from exposing himself to identification, even if this includes some movement, such as going from the jail to the courtroom for trial or rising, if called upon * * *. and it may well be argued that use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles.' But this truism does not settle whether Stovall was deprived of his Sixth Amendment right to counsel; although the two rights often overlap, they are not congruent. No one would suppose, for example, that because the Fifth Amendment does not protect a defendant from being compelled to stand up in court and try on a garment found at the scene of the crime, the prosecutor could require defense counsel to absent himself during such an episode." 355 F. 2d at page 743.

Justice Friendly in a footnote goes further in the destruction of the position that the *sole* function of counsel is to safeguard the defendant's privilege against self-incrimination. He opined:

> "Once it has been held, as these cases clearly did, (*Massiah, Hamilton* and *White*) that the Sixth Amendment may apply outside the courtroom and when, as in Massiah, the accused did not even know of the presence of the police or the prosecutor, I see no escape from the conclusion that, if the right has attached, the accused is entitled to the assistance of counsel when the prosecutor attempts to use him as a means of procuring evidence to be offered at the trial. I cannot believe my brothers would go to the extent of saying that, after arraignment or indictment, *counsel could* be excluded while the defendant was being subjected to medical examination or blood or handwriting tests. If counsel cannot be excluded from such procedures, common sense does not supply me with a satisfactory answer why he can be barred from an identification—which his client is compelled to attend—although no one would dream of excluding him from a less meaningful one in the courtroom; the argument that although excluded from the former, he will have an opportunity to attack both identifications at trial, does not seem sufficient for preventing him from rendering all possible assistance to the accused before the witness' impression hardens. I fear that my brothers simply have not been able to adjust their sights to the Supreme Court's new concept that the right to the assistance of counsel embraces activities outside the courtroom." 355 F. 2d at page 743.

People v. *Gilbert,* 63 Cal. 2d 690, 47 Cal. Rptr. 909 (1965) erroneously viewed the post-indictment and arraignment lineup as simply a Fifth Amendment problem. In *Schmerber* v. *California,* 86 S. Ct. 1826, 1833 (1966), the Fifth Amendment theme again predominates. However, since the situation is pre-indictment, the Sixth Amendment question was largely passed over. In *Miranda* v. *Arizona,* 86 S. Ct. 1602 (1966), there again appears too much Fifth Amendment emphasis (Harlan, J. dissenting) at pp. 1646, 1647.

In *Wade* v. *United States* (5th Cir. 1966), 358 F. 2d 557, the appellant was indicted by a Federal grand jury in Texas for conspiracy to rob a bank and having robbed it. Counsel was assigned the accused. While in custody, and without notice to counsel, he was taken to a lineup and identified by the bank president and cashier. The court *inter alia* adopted the position of the dissenting judges in *Stovall, supra,* holding that the compulsory confrontation of the accused with the victim of a crime for identification purposes after indictment and without notice to counsel violated the Sixth Amendment and warranted a reversal.

In *Stovall, supra,* to the argument that the police could have transported the accused to the hospital for identification purposes before arraignment so why not after, Justice Friendly in *Stovall* replied:

> "But many things can be done in the absence of counsel in the investigation stage before the 'criminal prosecution' begins, which cannot lawfully be done later, as Massiah v. United States, supra, plainly shows." At page 745.

It was this distinction which explains Mr. Justice Stewart's changeover from writing the majority opinion in

Massiah to dissenting in *Escobedo* which involved the refusal of counsel at a pre-judicial stage of the criminal proceedings. In the *Escobedo* dissent, 378 U. S. 478, 493 (1964), Mr. Justice Stewart spoke for himself as follows:

> "Massiah v. United States, . . . is not in point here. In that case a federal grand jury had indicted Massiah. He had retained a lawyer and entered a formal plea of not guilty. Under our system of federal justice an indictment and arraignment are followed by a trial, at which the Sixth Amendment guarantees the defendant the assistance of counsel. But Massiah was released on bail, and thereafter the agents of the Federal Government deliberately elicited incriminating statements from him in the absence of his lawyer. We held that the use of these statements against him at his trial denied him the basic protections of the Sixth Amendment guarantee. Putting to one side the fact that the case now before us is not a federal case, the vital fact remains that this case does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him. The Court disregards this basic difference between the present case and Massiah's with the bland assertion that 'that fact should make no difference. . . .'"

It is "that fact", I submit, which makes all the difference. Under our system of criminal justice the institution of formal meaningful judicial proceedings, by way of indictment, information or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point the constitutional guarantees attach which pertain to a criminal trial. Among

those guarantees are the right to a speedy trial, the right of confrontation, and the right to trial by jury. Another is the guarantee of the assistance of counsel." At page 494. Cf. *Spano* v. *New York*, 360 U. S. 315, 327 (1959) (Stewart, J. concurring).

In view of the fact that Gilbert was denied his right to counsel after the commencement of judicial proceedings, the case must be reversed.

III.

Petitioner after being apprehended in Pennsylvania by federal agents asserted his right to an attorney and his right to silence. Nevertheless, through unwarranted questioning at the least and probable trickery, Gilbert was compelled to furnish the agent with handwriting exemplars which were used to prove guilt of the charges against him. Thus, his Sixth, Fifth and Fourteenth Amendment rights were violated.

F.B.I. Agent Dean arrested Gilbert in Philadelphia on February 26, 1964. Dean attempted to interrogate Gilbert about the Alhambra bank robbery but Gilbert refused to talk until he obtained the advice of counsel. Later on the same day, another agent attempted to interrogate Gilbert. The agent, Shanahan, told him that he was not required to say anything without advice from an attorney and that any statement he furnished might be used against him. Gilbert expressed his intention not to talk about the California bank robbery but agreed to talk about other matters. Shanahan interrogated Gilbert about Philadelphia robberies in which a demand note had been used and Gilbert was asked to give some samples of his handwriting. Gilbert then wrote some exemplars. Shanahan testified that

the exemplars were obtained for the purpose of investigating the Philadelphia robberies and they were thereafter filed by the F.B.I. in the same manner as fingerprints. He did not tell Gilbert that the exemplars would not be used in any other investigation. (See 63 Cal. 2d at 708.)

The prosecution in California sought to introduce Exhibits 74-A through H, which were Gilbert's handwriting exemplars obtained by FBI agents in Philadelphia. Gilbert objected to their use upon the grounds that they were obtained in violation of his Fifth and Sixth Amendment rights (R. 1850, 1851, 1856, 1857). The Court below denied said objections (R. 1852).

In addition, an expert who identified Gilbert's handwriting on the bank-area drawing found in his apartment by comparison with the exemplars so testified and similar motions were again denied (R. 1892, 1908, 1912).

The California Supreme Court never reached the Constitutional objections to the handwriting exemplars for it concluded that Gilbert had waived his Constitutional rights by consenting to providing the exemplars in question. 63 Cal. 2d at 708, 47 Cal. Rptr. at 920 (1965).

Initially, we can now say with certainty that the record displays anything but a waiver under the above facts. The prosecution carries a "heavy burden" when it seeks to establish that the defendant has surrendered a Constitutional right. *Miranda* v. *Arizona,* 86 S. Ct. 1602, 1612, 1628 (1966). As a matter of fact, when Gilbert first explained he didn't desire to talk until he was advised by an attorney, the Federal Agents' right to further interrogation abruptly ceased. *Miranda* v. *Arizona,* 86 S. Ct. at 1627, 1628. Unless and until Gilbert acquired an attorney, his wishes

must have been honored and the continued requests for information, oral or written which produced the handwriting exemplars were in contravention of Gilbert's Fifth, Sixth and Fourteenth Amendment rights. *Miranda, supra,* at pp. 1628, 1638-39.

The requirement of a clear and intelligent waiver before Constitutional rights are lost has been with us for a long time. *Johnson* v. *Zerbst,* 304 U. S. 458 (1938); *Gibbs* v. *Burke,* 337 U. S. 773 (1949); *Hawk* v. *Olson,* 326 U. S. 271 (1945); *Johnson* v. *United States,* 225 U. S. 405 (1912). Its most graphic explication but not its origin is traceable to *Miranda.* Thus, the cut-off date of *Johnson* v. *New Jersey,* 86 S. Ct. 1772 (1966) does not apply.

Moreover, after a fair reading is given to the conversation with Agent Shanahan, it is apparent that both Gilbert and the agents were operating under the assumption that the evidence being acquired from Gilbert's lips and pen was limited to the Pennsylvania cases and not to California. Agent Shanahan testified:

> "Well, to clear this up, when I first started to talk to him, I asked if he would like to talk to me, you know, and he said he would providing it didn't pertain to the case here in California. That he would agree to talk to me, so I interviewed him on that basis, that I wouldn't talk about the California case. I just wanted to talk to him about the cases that we were interested in in Philadelphia" (R. 1833-1834; A-15-16).

Either the handwriting samples were obtained by subterfuge and false representations or the Agent should be held to his word and should not have used the information Gilbert supplied to convict him of crimes in California.

The California Supreme Court concluded that even if Gilbert believed that the samples would not be used against him in California the belief was not improperly induced by the federal agents. This resembles the venerable white lie. It appears alluring to conclude that if the Agent induced Gilbert to present him with handwriting samples without threats or promises pertaining to any of his cases, the information obtained, since reliable, should be utilized to the fullest lest a guilty man go free. The argument is spurious. It is bottomed on the assumption that Agent Shanahan had a right to the handwriting exemplars to begin with. If Gilbert had the right to refuse giving the exemplars he certainly had the right to furnish them under certain conditions. And the condition explicitly imposed was that Gilbert didn't want to give evidence against himself on the California case. His stated desire should have been honored.

Rather, the Federal Agents employing a technique reminiscent of the tarnished silver platter doctrine, see *Elkins* v. *United States,* 364 U. S. 206 (1960), filed the prints with their nationwide organization clandestinely smug in the not to improbable assumption that the exemplars would soon be summoned elsewhere. The general law of ruse and subterfuge has applicability here and affords an additional reason for exclusion of the handwriting and the testimony based thereon, *Gouled* v. *United States,* 255 U. S. 298, 305 (1921); *Fraternal Order of Eagles, No. 778* v. *United States,* 3rd Cir. 57 F. 2d 93; *People* v. *Reeves,* 61 Cal. 2d 268, 38 Cal. Rptr. 1 (1964).

A. Petitioner's Sixth Amendment Rights Were Violated.

It is unnecessary to repeat all that has been said on the semi-analogous issue of right to counsel at a lineup. Suf-

fice it to say that the only difference between the lineup and the furnishing of handwriting exemplars in the context of the case at bar is the absence of formal judicial proceedings at the point the samples were extracted.

Petitioner acknowledges that the lineup issue is an easier case but that under Sixth Amendment protection against handwriting samples in the absence of acceptable Constitutional waiver, we should reach the same result. Bearing in mind that *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) is squarely a Sixth Amendment case which extends the right to counsel to the inception of custodial interrogation or its equivalent it is only necessary to emphasize the importance of this early stage of the proceedings to the accused in order to appreciate the violation here. The *Escobedo* court held that when the accused was placed in custody and the focus of suspicion had centered upon him, the right to counsel ripened. The Court pointed out that at that stage he needed "the guiding hand of counsel" and by contrast the stage was surely as critical as the innocuous entry of a plea of not guilty in *Hamilton* v. *Alabama,* 368 U. S. 52 (1961). The Court concluded that "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." At page 486. See also the dissenting opinions in *Cicenia* v. *La Gay,* 357 U. S. 504 (1958) and *Crooker* v. *California,* 357 U. S. 433 (1958).

Once the right to counsel attaches, the defendant's right to his assistance begins whether self-incriminatory activities are in the offing or not. See *Wade* v. *United States*

(5th Cir. 1966), 358 F. 2d 557; *Stovall* v. *Denno,* 355 F. 2d 731 (1966) (dissent). A reversal is therefore imperative.

B. The Handwriting Exemplars Taken From Petitioner Were in Violation of His Fifth and Fourteenth Amendment Rights.

The Fifth Amendment provides that no person can "be compelled in any criminal proceeding to be a witness against himself." *Twining* v. *State of New Jersey,* 211 U. S. 78 (1908); U. S. Const. Amendment V. This is the general formulation of the privilege against self-incrimination which is one of the most deeply rooted and sage principles in Anglo-American judicial history. It developed as a protest against the Star Chamber and other accepted procedures for compelling persons to become self-accusers. *Miranda* v. *State of Arizona,* 86 S. Ct. 1602, 1619-20 (1966).

Recently, this Court ruled that the privilege which had hitherto been considered only applicable against the Federal Government was incorporated in the Fourteenth Amendment and thereby transmitted to the States. In *Malloy* v. *Hogan,* 378 U. S. 1 (1964), this Court held that "(t)he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence." At page 8. The decision has since seen reinforcement and elaboration. *Griffin* v. *California,* 380 U. S. 609 (1965).

In *Massiah* v. *United States,* 377 U. S. 207 (1964) this tribunal held that after the arraignment in a Federal

Court the defendant had the absolute right of counsel and self-incriminatory statements extracted from the accused subsequent thereto and in the absence of counsel, without a waiver thereof, were inadmissible.

In *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), this Court applied the *Massiah* rule to *State* courts through the Fourteenth Amendment and held that when an investigation ceased being an inquiry into an unsolved crime and began to focus on the defendant, he was in custody, the officers were seeking to elicit ineriminating statements, he must be warned that he has an absolute right to remain silent and an absolute right to counsel thereafter. See *People* v. *Dorado,* 62 C. 2d 338, 42 C. R. 169 (1965). These standards were reiterated and fuller explication was provided in *Miranda* v. *Arizona, supra.*

There can be no doubt but that the standards laid down in *Escobedo* and *Miranda* render Gilbert eligible for Fifth Amendment protection. The crime had been committed, he was under arrest (Cal. Supreme Court, Opp. p.), the Federal Agents sought to elicit incriminatory matter. Thus, the only question of novelty for this Court is whether the extraction of handwriting exemplars violates Gilbert's Fifth and Fourteenth Amendment rights.

The most recent exposition on the nature and boundaries of the Fifth Amendment, not involving confessions or admissions, is found in *Schmerber* v. *California,* 86 S. Ct. 1826 (1966). There the defendant was convicted of driving an automobile while under the influence of alcohol. This Court by a vote of five to four, held that the evidence of analysis of petitioner's blood taken over his objection by a physician in a hospital after arrest, was not inadmis-

sible on the ground it violated the Fifth Amendment privilege against self-incrimination. The Court expressly refused to follow the Wigmore or narrow view of self-incrimination which defines self-incrimination only in terms of "the employment of legal process to *extract from the person's own lips* an admission of guilt which would take the place of other evidence." 86 S. Ct. 1832 fn. 7. The Court instead posits a broader test:

> "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of analysis in question in this case did not involve compulsion to these ends." At pages 1830-31.

The Court then recognizing that the formulation of a test was far easier than its application, labored to point out that the test was merely a "helpful framework for analysis" and that it did not "agree with its past applications in all instances" and acknowledged that there would be "many cases in which such a distinction is not readily drawn." At page 1832. In fact, the Court explicitly hypothesizes a self-incriminatory situation not involving the extraction of confessions or admissions in the traditional sense. The lie detector which seeks to determine whether a person is telling the truth through his physiological responses measured by changes in body function during an examination would "evoke the spirit and the history of the Fifth Amendment." At page 1832.

Moreover, the Court reaffirmed its half-a-century old holding in *Boyd* v. *United States,* 116 U. S. 616 (1886) by

declaring that "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers." At page 1832. The Court noted that the privilege "is as broad as the mischief against which it seeks to guard." At page 1832. *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892).

Finally, the Court concluded that:

> "In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." 86 S. Ct. at 1833.

Although this case is one of first impression for this Court, many cases are available in lower tribunals which have declared that the taking of handwriting exemplars is a violation of the Fifth Amendment or like protection. See Weintraub, Voice Identification, Writing Exemplars and The Privilege Against Self-Incrimination, 10 Vanderbilt Law Review 485, 492-503 (1957). Similarly, some Courts have declined to so hold. Ibid.

The author reviews some of the tests used to determine whether handwriting samples merit Fifth Amendment coverage. Some cases have held handwriting exemplars incriminatory as distinguished from appearing in a lineup, having fingerprints taken or the like on the ground that handwriting involves "*active* participation and *affirmative* conduct" while the latter involves mere "*passive* cooperation." Weintraub, *supra,* at pp. 497-99. Weintraub then refers to another test which would have the privilege of self-incrimination turn on whether the act places reliance upon the veracity of the accused. Ibid. 503. He concludes that a writing exemplar constitutes an implied statement by an accused that it is his natural handwriting and thus under the "veracity test" the Fifth Amendment privilege attaches.

The article cites authority which discloses that handwriting, while premised on the assumption that a person's handwriting is sufficiently unique, like fingerprints, to separate him from the herd, is actually no way near as individualistic and incapable of disguise. See Weintraub, *supra,* p. 497 fn. 43.

The most eloquent statement for treating handwriting as self-incriminatory was found by this counsel in the dissenting opinion of Mr. Justice Peters in *People* v. *Graves,* 64 A. C. 216, 49 Cal. Rptr. 386 (1966). The opinion dealt with a forgery prosecution wherein the defendant without previous admonitions regarding the right to counsel and silence furnished the police with his handwriting exemplars which were then utilized to convict him. The majority never reached the question of self-incrimination because it limited the *Escobedo* rule to confessions and admissions. Justice Peters in dissent pointed out that:

"The United States Supreme Court in *Escobedo* was primarily interested in preventing improper police tactics which spawned involuntary confessions. It concluded that the presence of counsel would go far to eradicate such tactics . . . But those coercive practices thus sought to be restricted are not limited to obtaining confessions in the form of statements from an accused. There is no legal difference between a defendant being coerced into obtaining for the police documents or real evidence not otherwise obtainable by legal process, and being coerced into giving incriminating statements. There is no guarantee that coercive methods will not be used by the police to obtain documents or chattels which are unobtainable by a search warrant because their location is unknown and unobtainable by legal compulsion because the use of such compulsion would violate the defendant's privilege against self-incrimination. Coercion can also be used to elicit incriminating conduct . . . . That handwriting exemplars may be coerced from a defendant in the same manner as are statements is clearly shown by *People* v. *Matteson,* 61 Cal. 2d 466, 39 Cal. Rptr. 1, 393 P. 2d 161, wherein we held handwriting exemplars obtained by brutality to be inadmissible under *Rochin* v. *People of California.*

"It is evident that coercive methods or other improper police practices can be used to elicit incriminating evidence through several other forms than through statements. In each case the accused is persuaded to obtain or create evidence against himself. The fact that such evidence is usually obtained through statements, since this method requires the least action on

the part of the accused and hence the least amount of persuasion, does not obviate the danger that coercive methods will be used to obtain evidence in other ways. On the contrary, because the obtaining or creating of nonverbal evidence generally requires more active participation on the part of the accused, there is a greater danger that coercive methods will be used to obtain such evidence." 49 Cal. Rptr. at 389.

"It is true, as the majority state, that not every aid that a defendant or suspect is required to give the prosecution violates the privilege against self-incrimination. An accused can be fingerprinted, photographed, and measured without his consent; he may be ordered to stand up in court for identification or to try on items of clothing; blood samples may be taken from a suspect without his consent if the means used to obtain them do not shock the conscience. . . . In the above cases, however, the evidence sought relates to the physical characteristics of the defendant and is already in existence. It is universally conceded that one can rely on the privilege in refusing to produce documents or chattels in the face of a subpoena or other legal process. . . . There is a similarity between compelling a defendant to produce a document and compelling him to furnish a specimen of his handwriting for in both cases the witness is required to *actively procure* evidence against himself which is not then present. As stated by one court dealing with handwriting exemplars 'the present case is more serious than that of compelling the protection of documents or chattels, because here the witness is compelled to *write* and *create,* by means of the act of writing, evidence which does not exist, and which may identify him as the

falsifier.' (Beltran v. Samson and Jose (1929), 53 Philippine, R. 570, 577.) It would be a strange paradox if a defendant could successfuly invoke the privilege against self-incrimination in refusing to obtain existing samples of his handwriting, yet could be required to create similar samples by legal compulsion. Compelling a defendant to create samples of his handwriting can certainly not be regarded as *less* objectionable than compelling him to obtain samples already created. Since the samples can be used to prove that the accused wrote the forged checks, they are as much testimonial disclosures as are verbal admissions by the accused that he is the falsifier.

"It is also unreasonable to hold or to imply that the police, without advising a defendant of his right to counsel, can obtain handwriting exemplars at the accusatory stage which show that he wrote the forged checks, when, admittedly they could not request his verbal admission that he wrote those checks. A limitation of *Escobedo* in the elicitation of *statements* would encourage the police to obtain evidence from a defendant in other forms which are within the privilege against self-incrimination without advising him of his right to counsel. Admission of such evidence must therefore be held to constitute a violation of the right to counsel during the accusatory stage as established in *Escobedo*." 49 Cal. Rptr. 390, 391.

It stands to reason as Justice Peters points up that a defendant may be called upon to do many things which are equally as damaging to his case as furnishing a confession or admission; therefore, the *Escobedo* principle should guard against this possibility. Would this court, for ex-

ample, hold that the police without advising the accused of his rights could persuade him to reenact the crime? See *People* v. *Furnish,* 63 A. C. 536, 47 Cal. Rptr. 387 (1965). Additionally, Justice Peters pointed out that it is often actually easier to get someone to perform physical tasks that incriminate than to force a confession from his lips. Moreover, when the accused is actually conscripted to actually perform in such a way as to point the finger of guilt at himself as opposed to sitting quietly in the role of a donor alone and allow his guilt to be sopped up, cf., *Schmerber* v. *California, supra,* the privilege seems applicable.

Although a vague test, it appears that the more the defendant is enlisted to accuse himself—the greater his role—the more likely the attachment of the Fifth Amendment privilege. This seems demonstrably true when the defendant is called upon to actively procure evidence against himself, that is to *write* and *create* evidence which did not previously exist and which may tend to prove his guilt. Certainly in *Schmerber,* the evidence was already in existence and merely needed to be extracted with only the most nominal help of the defendant. Here, Gilbert is called upon to breathe life into a document that when viable spells his own destruction. Even in *Schmerber* the Court recognized that probable cause would have to exist before a person's body can be invaded, 86 S. Ct. at p. 1834, and perhaps some would hold that the documents in *Boyd* would be obtainable by a properly secured search warrant predicated on probable cause for the intrusion. But could any amount of probable cause justify a search warrant directive aimed at compelling the defendant to manufacture evidence against himself which did not previously exist? And of course, if the evidence in *Boyd* is unobtainable even

under a search warrant, it seems ludicrous to protect a defendant's papers in existence and not furnish protection to papers which the defendant must create in order for them to exist. Put another way, the only reason for not protecting Gilbert's writing on paper is that it didn't exist until Gilbert, without appropriate constitutional admonitions, was required to create it.

Under *Boyd*, which is followed in *Schmerber*, the officers could not even utilize judicial process to subpoena into Court the same handwriting exemplars had Gilbert written them before the interview with the agents. Unlike, perhaps the alcohol in Schmerber's system, the documents would not be contraband or fruits or instrumentalities of the crime. See *Entick* v. *Carrington* (19 Howell's State Trials, 1020); *Boyd* v. *United States, supra.* Thus, in this case the Court should regard the handwriting specimens as self-incriminatory in the Constitutional sense.

Justice Holmes once remarked: "It is one of the misfortunes of the law that ideas became encysted in phrases and thereafter for a long time cease to provoke further analysis" (dissent in *Hyde* v. *United States*, 225 U. S. 347, 391 (1912). Though the history of self-incrimination involves examples which are largely oral, this Court has recognized that such a narrow limitation is unwise and cannot endure. *Schmerber* v. *California, supra; Boyd* v. *United States, supra.* This Court must insure that the privilege "is as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892).

It also seems incongruous that the police are forbidden to ask, without appropriate admonitions, whether the accused

wrote the checks but can compel him to write in such a way as to furnish the answer.

One substantial factor in this whole controversy which has been hinted at but never faced is, assuming that there is no right to self-incrimination, to what lengths can a police agency go in obtaining the evidence sought. Is the shock the conscience test of *Rochin* really an adequate remedy and deterrent from superfluous physical coercion? To argue that one has no right to resist certain activity necessitates an evaluation of what happens when they do. It is one thing to say either allow blood to be extracted or your failure to permit it can be used against you as an admission and quite another to suggest to hundreds of thousands of policemen throughout the land that they have a right to get the evidence, the defendant has no right to refuse giving it, *so do your duty!*

Rochin shocked the conscience of this Court precisely for the reason that what was done there was accomplished by force, not that the manner of obtaining the evidence was cruel *per se*. Having one's stomach pumped is medically as innocuous as having one's blood extracted though it does not occur as frequently. But certainly this Court will not point to the routine manner in which persons daily sign their name as evidencing the right of a policeman to take signatures by force. As well state that the vast majority of the population undergo the daily experience of relating their past activities as a premise for choking such information out of them. Although *Schmerber* has been written, counsel feels that it is incumbent upon this court to wrestle with the necessary problem in its wake of what to do when the defendant says, no! A police officer may shoot to kill to prevent the commission of a felony. May he even draw

his pistol to compel handwriting exemplars? May he pummel the suspect or twist his arm? May he deprive the accused of food and drink or necessary sleep until his will is hopelessly broken? The coerced confession defense would be unavailing to a defendant once his actions which are compelled are declared to be outside the pale of protection against self-incrimination. Although these doctrines did not grow up as brothers and have to some extent a different justification they are inseparably entwined in an *Escobedo* context. The cases relied upon to reach the conclusions found in *Massiah* and *Escobedo* were largely coerced confession cases. Moreover, the police have no right to force a person to confess since the confession in order to be admissible must be both voluntary in the sense of not subject to force, threats of force or promises of leniency and must also be trustworthy. *Rogers* v. *Richmond,* 365 U. S. 534 (1961); *Payne* v. *Arkansas,* 356 U. S. 560 (1958). However, if this Court declares that the privilege against self-incrimination is unavailing and the defendant can therefore be compelled to actively perform as part of the law enforcement evidence gathering function, then it obligeth him not to complain of force being used against him for it merely proves him to be a perverse instrument in obstructing lawful detective work.

Many times this Court has erected an exclusionary rule of Constitutional dimensions or otherwise stemming from an acknowledgment that civil remedies against the police tactics were woefully inadequate to deter the forbidden behavior. Here the Court does not even leave the defendant a resort to the civil courts because the police apparently are using the force this court authorizes by implication.

In fact, this Court's decision in the *Schmerber* case, *supra,* encourages the use of force for it suggests that if force is threatened which in turn produces a self-incriminatory by-product such as an admission or confession or perhaps even a steadfast refusal to submit, the by-product may be inadmissible as a violation of the Fifth Amendment. *Schmerber* v. *California, supra,* at p. 1833, fn. 9. Thus from *Schmerber* police officers can get the inner sustenance they need to employ physical force to compel handwriting specimens, take blood samples and the like. If there is no privilege against self-incrimination, force is irrelevant and its products are admissible. If the force is only adequate to induce incriminating statements or a refusal to perform, such evidence is inadmissible due to the Fifth Amendment.

Although the Court suggests that there comes a point where force would be inappropriate, 86 S. Ct. at p. 1830, fn. 4, no indication is provided as to where it begins.

Does it strengthen respect for the "omnipresent teacher" to increase the use and justification for force in an era when too much force by law enforcement, real or fancied, is at the nerve center of so many grievances nationwide? Is it a sufficient answer to speculate that law enforcement will normally resort to only threats of force rather than force itself? Is it society's gain to widen the gulf between the citizen and the policeman?

The Court is on the verge of turning loose a Frankenstein monster—a monster who cannot act with the simplemindedness of a soldier on the battlefield, instructed that the enemy is evil and to kill them at will—a monster who

must tread uncertain mazes on a daily basis with a perplexity of attitude inhering in the situation in which his duty places him. Force is too ominous an entity to unnecessarily place in the hands of those whose training and disposition are tied in with the customary carriage of guns.

The whole society knows that when an officer calls halt that the penalty for disobedience may be great. This simple fact reduces the need for forcible police activity to a minimum. But if a policeman may twist a person's arm or hit him in the jaw in order to persuade him to write and is told that it is his duty—respect for the law will diminish and brutality on both sides will inevitably rise, perhaps appreciably.

If the privilege is nevertheless not available in situations wherein the accused must affirmatively act, it merely reinforces our earlier argument that counsel should be present whether the privilege against self-incrimination is involved or not. For it is doubtful that the police would resort to force with defense counsel as a witness. Furthermore, this recognition merely accentuates the point that when judicial proceedings have commenced, counsel and the Court should be present at all procedures whether self-incriminatory or otherwise. Then a defendant could be punished by contempt if he refused to participate in a lineup etc. and the compulsion of law would serve as a superior substitute for brutality in the station house. This calls to mind the farsighted statement of Professor Morgan:

> "The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates and the opportunities for im-

position and abuse are fraught with much greater danger." Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27 (1949).

IV.

The case against petitioner was derived largely from evidence illegally obtained from a private dwelling without a search warrant, an incident arrest or consent in violation of Amendments Four, Five and Fourteen of the United States Constitution.

A. How the Question Arose.

At trial, appellant objected to the introduction of certain testimonial and physical evidence upon the ground that it was unlawfully seized, or was the fruit of an unlawful search and seizure. A voir dire examination was held on the search and seizure issue (R. 1147 et seq.) followed by a defense motion to suppress said evidence upon the foregoing constitutional grounds (R. 1385/25-1386/14). Said motion was denied by the trial court (R. 1408/16-17).

The evidence included within said motion to suppress is set forth below, together with additional defense objections on search and seizure grounds and rulings thereon.

PHYSICAL EVIDENCE

Exhibit	*Nature of the Evidence*	*Objections and Rulings*
Ex. 14	Coin wrapper from Alhambra Savings and Loan	R. 2325/7-8
Ex. 46 46a 46b	Appellant's photograph	R. 1437/26-1438/1; 2332/24-2333/13, 26
Ex. 47) 48) 49)	Photograph of apartment	R. 1441/8-9 1440/7-9 1466/7-13
Ex. 50	.45 cal. magazine clip	R. 2334/22-23, 2335/6-7
Ex. 52) 52a)	Photograph of apartment	R. 1439/22-23; 2337/21-22
Ex. 54	Alpha Beta bag	R. 1505/6-7 2337/23-24
Ex. 56) 56a)	Notebook Sketch from note book	R. 2337/10-13, 24 2337/10-13, 24
Ex. 69	Photo of note pad	R. 2342/8-11
Ex. 70) 70a)	Fingerprints lifted from items in apartment	R. 2342/14-18
Ex. 71) 72)	Fingerprint comparison cards	R. 2342/23-2344/5
Ex. 74a-h	Handwriting specimens from Philadelphia (denial of counsel)	R. 2344/13-2345/3
Ex. 75	Handwriting specimens	R. 2346/5-20
Ex. 76	Illustrations of handwriting analysis	R. 2347/14-15

TESTIMONIAL EVIDENCE

Identification witnesses	R. 1385/7-24; 1408/16-17, 2357/25, 2358/8
Done E. Mire (handwriting expert)	R. 1935/26-1936/10

B. SUMMARY OF FACTS UNDERLYING THE SEARCH AND SEIZURE CLAIM.

Following the Alhambra bank robbery, Officer Billy Nixon searched the area to pick up the trail of the robbers. While doing so, he was hailed by a man who claims to have seen two men get out of one white car into another, then drive off in a northbound direction (R. 1057/15-1058/3; 1082/10-16). A few minutes later, Nixon came upon the white Pontiac which had been used by the two robbers as a get-away car (R. 1062/17-24).

Shortly thereafter, Nixon found Weaver, mortally wounded, sitting in a blue and green Chevrolet (R. 1068/23-1069/1; 1082/17-24).

Nixon accompanied Weaver to the hospital. Upon arrival, or shortly thereafter, he talked to FBI Agent James A. Norton. Norton then proceeded on up to interview Weaver.

Although there were three men involved in the robbery, the getaway driver being the third, Nixon had seen only two fleeing from the bank. There is no evidence that Nixon realized or informed other law enforcement officers of the

possibility of a third man. Officer Norton stated that Nixon had told him Weaver was one of the men who had participated in the robbery, but that Nixon had *not* indicated how many others he suspected were involved. (R. 1213/18-26).

Norton interviewed Weaver, who, after some prodding, identified "Skinny" Gilbert as his accomplice in the robbery. Norton immediately phoned the information into headquarters. This was about 12:15 P.M. (R. 1206/16-1208/3). Later, Weaver gave a description of where Gilbert lived, mentioning an apartment with a Hawaiian-sounding name (R. 1208/15-22). Norton phoned that information in, and also learned about that time that Skinny Gilbert was appellant (R. 1209/25).

Norton did not know Weaver, had never heard of him before. During his interview with Weaver, the latter was evasive and less than candid (R. 1216/17-25). Weaver admitted a prison record (R. 1217/3-6).

Meanwhile, at 12:30 P.M., FBI Agent Deal Keil received a radio assignment to proceed to Riverside and Los Feliz, and look for an apartment building with a Hawaiian-sounding name (R. 1172/24-1173/18).

By 1:00 P.M., he had found the building and radioed back the address. At that time, Keil had Gilbert's name as a possible suspect (R. 1173/25-1174/8).

Keil then ascertained that there was an Apartment 28, which he had been told to look for, and learned from the landlady that it had been rented to a Robert Flood *who had just left* for San Francisco for a few days (R. 1174/19-1175/1, 1177/7-15). In fact, Keil saw Flood talking to the landlady as he, Keil, entered the building; and saw Flood leave (R. 1178/22-26).

About ten minutes later, two other FBI Agents Schlatter and Onsgaard, arrived at the apartment building. Keil told them that a Robert Flood had rented the apartment, and had "apparently just left . . ." the building as he had come in. Schlatter and Onsgaard obtained a key from Mrs. Wilner, and entered Apartment 28. They searched the apartment and found an Alpha Beta shopping bag, rolls of coin, and a sketch of the Alhambra Savings & Loan Bank (R. 1253/19-1254/3) and a clip from a gun (R. 1255/1).

They also found appellant's photograph in an envelope lying on a bedroom dresser (R. 1301/23-24). Schlatter took the pictures and turned them over to Keil who in turn delivered them to Agent LaJeunesse at the Alhambra bank. LaJeunesse made copies of the photograph and showed them to witnesses for identification purposes (R. 1289/7-13).

Agent Schlatter testified that en route to the apartment building, information came over the radio that a third man was involved in the getaway car (R. 1246/15-21). He was of the belief that the third man might still be in the apartment (R. 1249/13-17), and he entered the apartment to find out (R. 1250/15).

Agent Schlatter admitted that before entering the apartment, he had learned from the apartment manager and from Keil that Flood had borrowed a key from her and had returned it (R. 1267/12-25; 1269/1-11); and he knew, before entering, that the resident of that apartment had left (R. 1270/11-12). He had no information that anyone else was in the apartment (R. 1280/6).

Later that day, a search warrant was obtained for stolen money and firearms (Exhibit 51). By this time, the .45 ammunition clip, note pad and sketch, the Alpha Beta bag

and rolled coins therein, had been inventoried and seized (R. 1312/4-7). A search for firearms and money revealed over $3,000.00 in currency sealed under some shirts in a dresser drawer (R. 1313/2, 1314/4-5). None of that currency pertained to the Alhambra bank robbery.

Several days later, a second search warrant was issued (Exhibit 55), pursuant to which numerous personal items were seized.

C. ARGUMENT.

Evidence obtained as the result of an illegal search is inadmissible in a state court. *Mapp* v. *Ohio*, 367 U. S. 643. Moreover, the standards for determining whether a search is reasonable are identical under both the Fourth and Fourteenth Amendments. *Ker* v. *California*, 374 U. S. 23.

Since the search in this case was of a dwelling (apartment), it could not be justified in the absence of a search warrant, "notwithstanding facts unquestionably showing probable cause." *Agnello* v. *United States*, 269 U. S. 20 (1925); *Taylor* v. *United States*, 286 U. S. 1 (1932); *Johnson* v. *United States*, 333 U. S. 10 (1948); *McDonald* v. *United States*, 335 U. S. 451 (1948); *Jones* v. *United States*, 357 U. S. 493 (1958); *Chapman* v. *United States*, 365 U. S. 610 (1960).

Only the doctrines of a search incidental to an effected arrest or a valid consent obtained by one authorized to give it operate as exceptions to this rule. *Stoner* v. *California*, 376 U. S. 483 (1964). Neither of these exceptions has application here.

The cases are legion which hold that a manager, landlady or landlord cannot consent to the search of another person's chosen domicile, albeit rented. *Stoner* v. *California*, 376

U. S. 483 (1964); *Lustig* v. *United States*, 338 U. S. 74 (1949); *United States* v. *Jeffers*, 342 U. S. 48 (1951).

Moreover, the *Stoner* case, *supra*, removes any doubt that the search here can be regarded as incident to a legal arrest. For in *Stoner*, as in *Gilbert*, the police were on the trail of two men accused of robbery (here, robbery-murder). As quickly as the information was gathered as to their whereabouts the police agencies in the respective cases went directly to the addresses which they believed contained the suspects. In each case, the person in charge of the apartment or hotel room was sought out for the key and complied by producing it to open the defendant's room. In neither case was the defendant found in the room; nevertheless, searches were undertaken resulting in the discovery of evidence damaging to the defendant's case. The defendants were apprehended elsewhere so the searches were not contemporaneous with the arrest and were at a place distant therefrom; thus the "search incident doctrine" is of no benefit to the prosecution. *Stoner, supra; James* v. *Louisiana*, 86 S. Ct. 15 (1955).

Although the California Supreme Court suggests that the *Stoner* case is distinguishable and the "exigent circumstances" notion mentioned in the old *McDonald* case (335 U. S. 451) justified the search due to the fact that the officers were in fresh pursuit of the bank robbers—the facts do not allow for such a conclusion.

Nowhere, we repeat *nowhere* is there any evidence that Gilbert was holed up in the apartment house which the officers visited and searched. The mere fact that the officers had some hearsay knowledge that Gilbert lived in Apartment 28 of an apartment building with a Hawaiian-sounding name in a certain neighborhood did not justify going to the apartment as the police did and searching it without per-

mission of the lawful occupant. Of significance is the fact that the officers took time out to seek out the manager, await the termination of her conversation with another, obtained a key and unlocked the door (R. 1192), rather than kick it in, is persuasive of the fact that they didn't expect to find the gunman at home but rather were *looking for evidence* against him.

Moreover, as in *Stoner, supra,* the law enforcement officials knew that the resident had just left and thus would not be found in the apartment. Only speculation could justify their proffered belief that perhaps one of the two remaining robbers was inside at the location. If this interpretation were allowed, then *Stoner* was incorrectly decided for in *Stoner* there was nothing to indicate to the officers that the second robber was not in Stoner's hotel room. In fact, if anything, recognition that the law was hot on Gilbert's trail would make it less likely that he would be holed up in Flood's apartment than that the companion robber would be living in Stoner's room since he had no special reason to assume that the police knew of *his* crime nor of his whereabouts.

The California Supreme Court thought it crucial that the search of the hotel room in *Stoner* was executed two days after the robbery and here less than two hours had elapsed. The Court thereby distinguishes *Stoner* because there was sufficient time to obtain a search warrant. 63 Cal. 2d 707. Disregarding the fact that the last direct ruling on the failure to obtain a search warrant when time permitted resulted in a declaration by a majority of this Court that such a failure would not render the ensuing search unreasonable, *Rabinowitz* v. *United States,* 339 U. S. 56 (1950), the fallacy in the Court's reasoning is its assumption that the officers had sufficient time to do so in *Stoner.* Certainly,

the number of days which elapse after a crime has been *committed* is no necessary indication that ample time was afforded to obtain a search warrant since the search warrant must be supported by an affidavit containing probable cause that contraband items, or the like, are located at a specified location. *Aguilar* v. *Texas,* 378 U. S. 217 (1960). Proof that a crime has been committed alone no matter how incontrovertible, furnishes no justification for arrest of a given individual nor a search of a certain location. In *Stoner,* the officers found Stoner's checkbook near the scene of the robbery, in the parking lot adjacent to the food market which was robbed. They then noted that two of the stubs had been drawn to the order of the Mayfair Hotel in Pomona. Certainly, the knowledge related thus far would have been considered far too puny to justify a search of Stoner's living quarters. Next the police learned that Stoner had a prior criminal record, which only slightly improved their search warrant prospects. See *United States* v. *Gebell,* 209 Fed. Supp. 11 (1962); *People* v. *West,* 237 Cal. App. 2d 801, 47 Cal. Rptr. 341 (1965); *People* v. *Reeves,* 61 Cal. 2d 268, 38 Cal. Rptr. 1 (1964). The police then obtained a photograph of Stoner from the Pomona police department. This photograph was subsequently presented to the two eyewitnesses to the robbery who both said the picture resembled the man who carried the gun. (The man was wearing goggles and a hat.) Then, and only then, did the police go to the Mayfair Hotel in Pomona. There is absolutely nothing in the *Stoner* opinion which even so much as suggests that the police had time to procure a warrant before inaugurating their search and the opinion certainly does not even hint that the factor was of any significance.

Although there is language in *McDonald* v. *United States, supra,* suggesting that an officer may ignore the search warrant requirement, this doctrine has lain fallow ever

since precisely for the reason that the exigent circumstances envisioned there have never occurred.

Mr. Justice Douglas, speaking for a majority in *McDonald* portrayed emergency circumstances as follows:

> "Here, as in *Johnson* v. *United States* and *Trupiano* v. *United States,* the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor likely to be destroyed as the opium paraphernalia in the *Johnson* case. Petitioners were busily engaged in their lottery venture. No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. Both those reasons are no justification for by-passing the constitutional requirement . . ."

Here the apartment could have been surrounded with a police cordon while a search warrant was being expeditiously prepared. Gilbert could neither leave nor enter.

To distinguish *Stoner* on a few varying facts would lead to confusing Constitutional doctrine which would unnecessarily raise a plethora of problems for our lower courts. This tribunal should resist drawing a distinction so fine that difficulties in application will be insurmountable and unrelenting.

Furthermore, the search actually launched betrayed the claim that the reason for entry was to dislodge Gilbert. The fact that the officers took time out to obtain a key from the manager (R. 1177) and unlocked the door (R. 1192), rather than kicked it in, is persuasive of the fact that they didn't expect to find the gunman at home but rather were looking for evidence against him. Since it is clear that an

arrest cannot be used as a pretext for a search (*Abel* v. *United States*, 362 U. S. 217, 225-6 (1960); *Jones* v. *United States*, 357 U. S. 493, 500 (1958); *Harris* v. *United States*, 331 U. S. 145, 153 (1947); *United States* v. *Lefkowitz*, 285 U. S. 452, 467 (1932); *United States* v. *Robinson* (2nd Cir. 1963), 325 F. 2d 391; *United States* v. *Harris* (6th Cir. 1963), 321 F. 2d 739; *Taglavore* v. *United States* (9th Cir. 1961), 291 F. 2d 262, 265; *Keiningham* v. *United States* (D. C. Cir. 1960), 287 F. 2d 126; *Worthington* v. *United States* (6th Cir. 1948), 166 F. 2d 557-566; *United States* v. *Smalls*, 223 F. Supp. 387 (1963); *United States* v. *Evans*, 194 F. Supp. 90 (1961); see also *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1930); *Ker* v. *California*, 374 U. S. 23, 42 (1963); *Henderson* v. *United States* (4th Cir. 1926), 12 F. 2d 528), this search was unequivocably invalid.

Moreover, after a search lasting from a few seconds to a minute, the officers learned Gilbert was not in the apartment (R. 1271/13-18). This they admitted. Ibid. Nevertheless, Agent Schlatter continued to scour the premises for thirty additional minutes and upon leaving noted that other police officials were still at work (R. 1271/21-22). The harmful photographs which were used to gather identifying witnesses were removed in the course of this search from an envelope lying on the bedroom dresser (R. 1301/23-24). Although Gilbert's precise description was unknown to Agent Schlatter, it can hardly be contended that Gilbert had suddenly become sufficiently diminutive to fit inside an ordinary envelope. Furthermore, although the lower court suggested that suspicious objects in plain view may be inspected (63 Cal. 2d 707), it was necessary to *open* the innocuous appearing envelope in order to locate Gilbert's pictures. Since the search was exploratory, *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Henderson* v. *United States* (C. A. 4th), 12 F. 2d 528, 51 A. L. R. 420, it was illegal.

The court below implies in its opinion that the photographs were removed pursuant to a warrant that issued January 3, 1964 (see A-13, no. 5); the record indicates that Agent Schlatter entered at approximately 1:30 P.M., with the photographs being removed about 15 minutes later (R. 1195, 1256). The search warrant issued at approximately 4:00 P.M. (R. 1283). The photographs were taken to the association where they were enlarged by Polaroid process and shown to eyewitnesses (R. 1288-1292). They were also used before the grand jury for identification purposes (R. 2332-2333). There is no suggestion in the opinion of the court below that the evidence upon which Gilbert was convicted came from any source other than the exploitation of the entry into his apartment.

That the Government cannot profit from the illegal search by later obtaining a warrant to obtain the same materials originally illegally possessed was forcefully declared by Mr. Justice Holmes in the early case of *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920):

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and they may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States*, 232 U. S. 383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not

> the law. It reduces the Fourth Amendment to a form of words (citation omitted). The essence of a provision forbidding the acquisition in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U. S. 391.

In accord: *People* v. *Berger*, 44 Cal. 2d 459, 282 P. 2d 509 (1955).

The exclusionary rule was first fashioned to impose a meaningful sanction against unlawful search and seizure. *Weeks* v. *United States, supra; Mapp* v. *Ohio*, 367 U. S. 643, 660 (1961); *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955). To allow secondhand use of illegally seized evidence through the mouths of witnesses creates an unfair temptation to police officers to bend the requirements of the law to secure useful information. Cf., *People* v. *Stoner*, 241 A. C. A. 814, 50 Cal. Rptr. 712 (1966). The use of photographs before the grand jury for identification purposes fatally infected the indictment and trial in the case at bar in that such use was plainly the exploitation of the initial illegal entry and search. The witnesses procured in part through the use of the illegally seized photographs, should be prevented from doing exactly what the police meant to do when they took the photographs from the apartment, i.e., to implicate Gilbert in the robbery. Similarly, all other direct discoveries in the apartment and their fruits must be denied admission in evidence. *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Silverthorne, supra;* see *Nardone* v. *United States*, 308 U. S. 338 (1939).

Respectfully submitted,

LUKE MCKISSACK
Attorney for Petitioner